IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-626

WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

*Petitioner,*

*v.*

RICHARD B. MEYER, CARL ANTENUCCI, STEVE NARKER, THOMAS WHITE, LESLIE C. KISSICK and MICHAEL N. SOTTILE, as Administrators and Trustees of the Profit Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Incorporated,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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October 23, 1975.

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner William Nolan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 29, 1975.

## Opinion Below

The opinions of the United States Court of Appeals and the District Court for the Southern District of New York, not yet reported, appear in the Appendix hereto.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 29, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether federally qualified profit-sharing plans constitute jurisdictionally insubstantial or frivolous federal subject matter.

2. Whether it is a prerequisite to the application of federal common law that the federal statute(s) provide the express remedy for the relief sought.

3. Whether this Court in *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117 (1973), in recognizing state arbitration and anti-trust public policy, precluded a federal public policy with respect to forfeiture of benefits for competitive employment in nation-wide qualified profit-sharing plans.

## Statutory Provisions Involved

**United States Code, Title 28:**

**§ 1331. Federal question; amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter of controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States.

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**United States Code, Title 26:**

**§ 401. Qualified pension, profit-sharing, and stock bonus plans**

**(a) Requirements for qualification.**—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a) (3) (B) (relating to deduction for contributions to profit-sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

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**United States Code, Title 29:**

**§ 301. Findings and policy**

(a) The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly af-

fected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that owing to the lack of employee information concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made with respect to the operation and administration of such plans.

(b) It is declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee welfare and pension benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto.

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**United States Code, Title 29:**

**§ 303. Plans within chapter**

(a) Except as provided in subsection (b) of this section, this chapter shall apply to any employee welfare or pension benefit plan if it is established or maintained by any employer or employers engaged in commerce or in any industry or activity affecting commerce or by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce or by both.



## Statement of the Case

Petitioner William Nolan was employed as a registered representative by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") in one of its branch offices in New Jersey in 1957. During his employment, he became a participant in Merrill Lynch's profit-sharing plan. In 1968, after he had accumulated about $16,000.00 in benefits, he voluntarily resigned and continued his career as a registered representative with another brokerage firm. The administrators of the plan declared those benefits forfeit under a provision adopted in 1960 providing for forfeiture of benefits for competitive employment without any geographical or time limitation. Petitioner would otherwise have been entitled to receive his benefits in full except for this provision. The plan was non-contributory and the forfeited benefits were re-allocated among the other participants. In 1973, Merrill Lynch discontinued the plan and distributed the corpus except for a reserve of $4,400,000 for all contingencies and legal and other costs.

Petitioner commenced this action as a class action in August, 1974 to seek a declaration that the forfeiture clause was unenforceable upon the grounds that it enervates free competition in interstate commerce and constitutes an unreasonable restraint on competition at common law. This action is a first impression case. The class consists of employees whose numbers are estimated in the hundreds who voluntarily left and whose benefits were forfeited for competitive employment.

Respondents moved in the District Court for the Southern District of New York in September, 1974 to dismiss the complaint under F.R. Civ.P. Rule 12(b)(1) and Rule 12(b)(6). On the oral argument of the motion, Petitioner supported jurisdiction solely on the grounds of federal common law under 28 U.S.C. § 1331(a) in reliance on the landmark federal common law cases decided in this Court.

On January 14, 1975, the District Court dismissed the complaint for lack of jurisdiction in F.R. Civ.P. Rule 12(b)(1).

The District Court held (Appendix A, pp. 1a-5a) that since the statutes cited by Petitioner for the federal statutory scheme of profit-sharing plans, the Internal Revenue Code, 26 U.S.C. § 401, and the Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301 did not provide an express civil remedy, and that *Barlow* v. *Marriott Corporation*, 328 F. Supp. 624 (D.C. Md., 1971) and *Lieberman* v. *Cooke*, 343 F.Supp. 558 (W.D., Pa., 1972), cases which founded federal jurisdiction directly on those statutes, were applicable and state law governed. The District Court also cited the decision of this Court in *Merrill Lynch* v. *Ware*, 414 U.S. 117 (1973) and held that since Merrill Lynch did not establish that national uniformity in the area of wage claims was vital to federal securities policy the same may be concluded concerning federal policy with respect to profit-sharing plans.

In the Court of Appeals, Petitioner argued that the principles enunciated by the Second Circuit in *Ivy Broadcasting Co., Inc.* v. *American Telephone & Telegraph Co., et al.*, 391 F.2d 486 (Second Circuit, 1968) were pivotal to the jurisdiction issue since no claim was made for jurisdiction based upon a federal statute which provided a civil remedy. In *Ivy Broadcasting, supra,* the Second Circuit held that original federal jurisdiction existed of a common law claim for breach of contract and negligence to recover damages relating to telephone services. The operative federal statute, The Communications Act of 1934, 47 U.S.C. § 151, did not provide a civil remedy for breach of contract or negligence by a telephone company. There was no diversity of citizenship. Petitioner also cited the findings and policy of Congress in The Welfare and Pension Plans Disclosure Act, *supra,* to the effect that such plans are affected with a national public interest and have become an important factor in commerce because of the interstate character of their activities.



Petitioner submitted to the Court of Appeals that a qualified profit-sharing plan is as significant federal subject matter for the application of federal common law as that of a telephone bill or services as was held in *Ivy Broadcasting Co., supra,* or a free railroad pass as was held in *Francis* v. *Southern Pacific Railway,* 333 U.S. 445 (1948), or, a federal check as was held in *Clearfield Trust Co.* v. *United States of America,* 318 U.S. 363 (1943).

The Court of Appeals affirmed (Appendix B, pp. 7a-14a), and concluded that the subject matter of nation-wide profit-sharing benefits was federally insubstantial and frivolous: the remedy for the illegality of the forfeiture clause had nothing to do with the federal statutes cited; that under *Merrill Lynch* v. *Ware, supra,* a claim for benefits under a national profit-sharing plan is a claim for wages governed by state law and, that if any remedy existed it was under the federal anti-trust laws.

The Court of Appeals did not cite *Barlow* or *Lieberman, supra,* and concluded that there was no Congressional intention that federal courts fashion a federal substantive common law remedy as in *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957).

## REASONS FOR GRANTING THE WRIT

### 1. The decision below raises significant and recurring problems concerning efforts to invoke jurisdiction for a federal common law claim.

At the core of the Court of Appeals decision is its holding that the subject matter of a federally-qualified profit-sharing plan was federally insubstantial or frivolous [13a], and the complaint was properly dismissed under an F.R. Civ. P. Rule 12(b)(1) motion. Such a conclusion was unmindful of an express Congressional statutory declaration of findings and policy that such plans are affected with a national public interest. Legislatively, historically,

and practically, such plans, and their sources and roots are entirely federal in character.

The plans are created in the first instance as trusts under a federal statute, 26 U.S.C. § 401, which also contains a mandate that they are for the exclusive benefit of employees. In 1958, with the enactment of The Welfare and Pension Plans Disclosure Act, *supra*. Congress declared that such plans are affected with a national public interest, and employers were required to annually file under oath a 16-page federal questionnaire administered by the Department of Labor. In 1962, with the enactment of 29 U.S.C.A. § 308, Congress made it a federal crime to violate that act, and in subparagraph (g) thereof, expressly provided for federal jurisdiction to restrain its violation. Between those years and 1974, reform of employer abuses in these plans was in continuous ferment. In 1974, Congress enacted the comprehensive Pension Reform Act, 29 U.S.C. § 1001, *et seq.* The text of the declaration of Congressional policy to that Act (Appendix C, p. 15a) substantially repeats the 1958 declarations of federal policy with supplementary findings that such plans are increasingly interstate; are carried on through the mails and instrumentalities of interstate commerce; substantially affect the revenues of the United States because of preferential tax treatment; that employees with long years of employment lose benefits owing to lack of vesting provisions and inadequacy and minimum standards assuring the equitable character of such plans. Although prospective in nature (Mr. Nolan's employment was between 1957-1968), the 1974 Congressional findings reflecting federal policy since 1958 were clear and continuing.[1] The plan at bar is one instrument affecting

[1] Mr. Justice Frankfurter in *Barsky* v. *Board of Regents*, 347 U.S. 442, 472 (1954) stated that "The right to work, I had assumed, was the most precious liberty that a man possesses." Mr. Justice Rutledge in *Thomas* v. *Collins*, 323 U.S. 516, 538 (1944) stated that "Espousal of the cause of labor is entitled to high constitutional protection."



employees in about 35 states, and the issue presented deals with an unfair method to restrain competition in interstate commerce. The magnitude of these meritorious claims should not be jurisdictionally rejected as federally insubstantial and frivolous.

The facts are also indisputable. The instant plan affected 5,700 registered representatives employed by Merrill Lynch in about 198 branch offices in about 35 states and the District of Columbia (Merrill Lynch Prospectus dated September 13, 1972 at page 2 filed with the Securities and Exchange Commission). Such plans, with similar forfeiture clauses are widespread in the securities industry. A study conducted by Bankers Trust Company (1973) entitled "The Private Pension Controversy" reported that by the end of 1970 the total number of workers covered by such plans had reached 29.7 million, or 48.3 percent of the private industrial labor force in the nation. Similar findings were made by the Committee on Education and Labor of the House of Representatives in Report No. 93-353 of the 93rd Congress, First Session, 1973 (Appendix D, pp. 16a-23a).

The Court of Appeals' conclusion of federal insubstantiality or frivolity is fundamentally unsupportable since it did not give recognition to the clearly exressed Congressional policy as well as the undisputed facts relating to the exclusive national nature of such plans.

The decision leaves federal jurisdiction unclear and confusing not only in this case, but in future cases where a party will seek to invoke federal common law for a particularly clear federal subject matter. For example, in *Ivy Broadcasting, supra,* the Second Circuit invoked federal common law jurisdiction under the tradational authorities and held in 391 F.2d at page 490 that the question was whether the federal statutory scheme for the regulation of interstate telephone services indicated a Congressional policy of uniformity. There, such policy was judicially

declared on the basis of a federal statutory scheme in the absence of an express Congressional declaration of policy.

At bar, there is a positive Congressional declaration. It is Petitioner's thesis that in areas of subject matter where the Congress has made an express policy declaration and finding of national public interest, as here, the federal courts should not judicially reject the subject matter, but indeed, should give full weight to that subject matter as conclusively federal.

*Ivy Broadcasting, supra,* is not an isolated case. It cited as authority for its holding many watermark cases decided in this Court. Its authority was relied upon by Petitioner in the Court of Appeals. It is vitally significant, not only to Petitioner, but to the federal courts and the future litigants who will start cases on its authority, that its holding be reviewed and clarified by this Court. A clarification is necessary and will tend to reduce the work load of the federal courts by eliminating case-by-case determinations and differing state decisions.

These conflicts justify the grant of certiorari to review the judgment below.

**2. The decision below conflicts with the landmark decisions of this Court in holding that it is a prerequisite to this action that the federal statutory scheme provide the express remedy.**

In holding that it was a prerequisite to the application of federal common law that a federal statute provide the express remedy claimed in the action—a declaration that the forfeiture clause was invalid—[12a], the Court of Appeals ignored and contradicted the many decisions of this Court where federal common law was indeed applied as a viable doctrine where there was no express statutory remedy. Indeed, the contrary is the well-established rule in the federal common law cases decided in this Court.



Thus, in *Clearfield Trust Co.* v. *United States of America,* 318 U.S. 363 (1943), where a forged indorsement of a federal check was involved, there was no federal statutory remedy, but federal common law was applied based upon the roots and sources of the subject matter. In *Urie* v. *Thompson,* 337 U.S. 163 (1948), this Court held that where the federal statute was silent as to the definition of the term "negligence", federal common law would be formulated and applied and not the different conceptions of "negligence" under state law. In *Francis* v. *Southern Pacific Railway,* 333 U.S. 445 (1948), where the federal statute was silent as to liability for interstate passengers riding on a "free railroad pass", this Court held a federal common law rule of negligence would be applied because the subject matter was governed by a federal statutory scheme.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), a case seeking damages against federal agents for violation of the Fourth Amendment to the United States Constitution, it was emphasized that it was obvious that no civil remedy was provided, and in the absence of an explicit Constitutional or Congressional declaration, it was held that federal common law would be applied. In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), the question presented was what substantive law would be applied in suits under the Labor Management Relations Act of 1957, 29 U.S.C. § 185. Jurisdiction was founded in that Act, but the Act did not provide a civil remedy for the claim. This Court held that the substantive law to apply was federal law which the Courts must fashion from the policy of our national labor laws, and that federal interpretation of the federal law would govern, not state law.

In *D'oench Duhme & Co.* v. *Federal Deposit Insurance Corporation,* 315 U.S. 447 (1942), the federal statute was silent as to a remedy, and federal common law was ap-

plied to the subject matter in that case of an accommodation maker to a note which had been assigned to a federal agency. In *State of Illinois* v. *City of Milwaukee, et al.,* 406 U.S. 91 (1972), there was no federal statutory remedy. It was held that the pollution of interstate waters were grounds for the application of federal common law, and that federal common law was included in the word "laws" within the meaning of 28 U.S.C. § 1331(a).

Law review articles by recognized authorities have declared that if claimant's position is that his right to relief is granted by federal common law, whether in connection with a statute or otherwise, jurisdiction in the national trial courts will be supported, Mishkin, *"The Federal 'Question' in the District Courts,"* 53 Col. L. Rev. 157, at 165 (1953), and Friendly, *"In Praise of Erie—and of The New Federal Common Law"*, New York University Law Review, May, 1964, Vol. 39, at pages 383, 392. Cf. Wright, Law of the Federal Courts, (2d Ed.), § 17, p. 159).

Even in *Ivy Broadcasting, supra,* the Second Circuit held federal common law applicable where there was no remedy for breach of contract and negligence mentioned in the statute, nor were any substantive contractual rights conferred by the statute.

In *Bell* v. *Hood,* 327 U.S. 678 (1946), a case involving a claim for money damages brought under the Fourth and Fifth Amendments of the Constitution, has been cited to mean that a claim must not be dismissed for lack of jurisdiction unless it appears to a "legal certainty" that the claim is wholly insubstantial or frivolous so far as the laws of the United States are concerned. See, *Grabinger* v. *Conlisk,* 320 F. Supp. 1213 (N.D., Illinois, 1970). In *Hagans* v. *Lavine,* 415 U.S. 528, 537 (1973), it was stated, the word "wholly" has cogent legal significance. The Court of Appeals did not give full measure of recognition to this burden in denying jurisdiction herein.



In all of the foregoing landmark decisions, it was never held that it was a prerequisite for the application of federal common law that the federal statute provide the express remedy sought, and the holding of the Court of Appeals in this respect conflicts with and contradicts the established authorities as well as its own prior decision in *Ivy Broadcasting, supra.*

It is respectfully submitted that the conclusion of the Court of Appeals [12a] that if there is a federal remedy it is the specific statutory provisions under the anti-trust laws is incorrect. Common law is the pride of our legal system. It has been held that federal anti-trust statutes did not supplant the common law, *Mans* v. *Sunray DX Oil Company,* 352 F. Supp. 1095 (D.C., N.D. Okla., 1971), and that claims to redress common law restraints do indeed survive, *Standard Oil Company* v. *United States,* 221 U.S. 1, 59-60 (1911). Moreover, this is a claim for restitution, not for three-fold damages.

These conflicts justify the grant of certiorari to review the judgment below.

### 3. The decision below conflicts with the decision of this Court in *Merrill Lynch* v. *Ware, supra,* in holding that federal recognition of state public policy precludes federal public policy.

The Court of Appeals held that because this Court did not federalize the law of profit-sharing plans under the federal securities act, as urged by Merrill Lynch in *Merrill Lynch* v. *Ware, supra,* that the decision in that case, *a fortiori,* was a bar to this action [12a]. Firstly, this Court expressly stated that the strong state public policies protecting wage earners in California from undesirable economic pressures would be upheld where those policies prevail in the absence of interference with the federal regulatory scheme, and that it found no such interference with

any federal policy. Secondly, there is a misconstruction and conflict on the facts, because Merrill Lynch did not seek the application of a federal rule in California but that the Plan be construed under New York Law in an arbitration proceeding at the New York Stock Exchange. Moreover, this Court also pointed out that Congress intended to subject stock exchanges to state regulation that was not inconsistent with the federal act and did so in § 6(c), 15 U.S.C. § 78f(c) by explicitly subjecting exchange rules to a requirement of consistency with the federal securities act and the applicable laws of the state in which it is located.

The position of the Securities and Exchange Commission, expressed in a brief in this Court, *amicus curiae,* on this very point indicated that it was well-recognized that state laws preserving competition can effectively compliment federal policy, so long as the functioning of the federal system is not disturbed, and cited *Standard Oil Company* v. *Tennessee,* 217 U.S. 413, 421-422 (1910) and *Puerto Rico* v. *Shell Company,* 302 U.S. 253, 261-263 (1937).

As was pointed out by this Court in *Merrill Lynch* v. *Ware, supra,* Congress in the securities field has not adopted a regulatory system wholly apart from and exclusive of state regulation. This Court concluded its opinion in 414 U.S. at page 140 by stating:

> "What has been said above provides the answer to this argument. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 766-767 (1945); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. R. Co.,* 393 U. S. 129 (1968); *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960)."



Thus, the Court of Appeals read into *Merrill Lynch* v. *Ware, supra,* a holding which this Court did not make, but which in fact this Court clearly expressed to the contrary, i.e., that state public policies will be upheld where they do not disturb federal public policies.

This conflict justifies the grant of certiorari to review the judgment below.

## CONCLUSION

**For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.**

Respectfully submitted,

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October 23, 1975.

**Appendix A, Opinion, United States District Court, Southern District of New York.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 3701 HRT

WILLIAM H. NOLAN, on behalf of himself and all others similarly situated,

Plaintiff,

*against*

RICHARD B. MEYER, et al.,

Defendants.

MILTON S. ZEIBERG, Esq., New York City, Attorney for Plaintiff.

BROWN, WOOD, FULLER, CALDWELL & IVEY, Esqs., New York City, Roger J. Hawke and Thomas J. Mullaney, Esqs., of counsel, Attorneys for Defendants.

TYLER, *D.J.*

Plaintiff commenced this action on August 23, 1974, for a declaratory judgment that the provision of the Employees Profit-Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Inc. ("the Plan"), which provides for the forfeiture of profit sharing benefits for competitive employment, is void and unenforceable. Plaintiff claims that this provision of the Plan violates the common law and "the legislative intent and public policy considerations" of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1 *et seq.;* Subchapter D of the Internal Revenue Code of 1954; 26 U.S.C.A. § 401 *et seq.;* and the Welfare and

Pension Plans Disclosure Act, 29 U.S.C.A. § 301 *et seq.* (Complaint, Paragraph 13). Plaintiff also seeks for each member of his class recovery of his profit-sharing benefits which were declared forfeit by defendant administrators and trustees of the Plan pursuant to the relevant forfeiture provision.

The defendants moved on November 8, 1974 to dismiss this action on the grounds that this court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(1) and (6), F.R.Civ.P. As this court finds that it has no jurisdiction over the subject matter, it is unnecessary to reach the issue of sufficiency of the claim.

*Federal Question Jurisdiction*

Plaintiff has alleged that "the forfeiture clause of the instant plan constitutes a rule-of-reason violation of the Sherman Act." The court may not reach the merits of this Sherman Act claim, however, as it is barred by the statute of limitations. The declaration of forfeiture upon which plaintiff bases his claim is alleged by plaintiff to have occurred on or about October 15, 1968. However, this action was not commenced until August 23, 1974, and the relevant statute of limitations is four years, 15 U.S.C. § 15b.[1]

Plaintiff next asserts that there should be federal question jurisdiction under 28 U.S.C. § 2201 because of the "federal nature of profit-sharing benefits and the federal statutory scheme surrounding their creation and administration" (Plaintiff's Memorandum in Opposition, pp. 22-3), specifically portions of the Internal Revenue Code,

[1] Plaintiff's cross-motion to add another party plaintiff, whose claim against the defendants allegedly is not time-barred, was withdrawn by plaintiff without prejudice at oral argument on November 8, 1971.



*supra,* the Welfare and Pension Plans Disclosure Act, *supra,* and "general federal public policy." While conceding that neither act provides for a civil remedy, plaintiff urges that the acts show "Congressional interest" in profit-sharing plans, which are "essentially federal in nature and subject to federal jurisdiction." Plaintiff's Memorandum in Opposition, p. 25, in *Barlow* v. *Marriott Corporation,* 328 F. Supp. 624 (1970), the United States District Court for the District of Maryland dismissed for lack of subject matter jurisdiction an action dealing with a profit-sharing plan's amendments which might have disqualified the plan under § 401. That court held that § 401(a) did not provide a basis for jurisdiction under 28 U.S.C. §§ 1331 or 1340, as "[n]on compliance with the Internal Revenue Code is collateral to the resolution of the dispute over those rights." 328 F. Supp. at 628. Section 401 does not prohibit profit-sharing plans which do not qualify under its provisions—the only effect of non-compliance is loss of certain tax deductions—and does not create a right in the employee to the continued qualification of such a plan. Therefore, the court found that under several tests,[2] no federal question was raised.

> "To paraphrase Professor Mishkin, plaintiffs do not have a substantial claim founded directly upon federal law, and, as Professor Wright suggests, there are present 'pragmatic considerations,' which strongly militate against the acceptance of jurisdiction in this case merely because the contracting parties may have contemplated the availability of certain tax benefits under federal law." *Id.* at 628.

[2] E.g. *Gully* v. *First National Bank of Meridian,* 299 U.S. 109, 112-113 (1936); Mishkin, The Federal "Question" in the District Courts, 53 Col.L.Rev. 157, 168 (1953); C. Wright Law of Federal Courts 58 (1970 ed.).

This court finds the *Barlow* holding persuasive.[3]

Nor does the Welfare and Pension Plans Disclosure Act provide a basis for federal question jurisdiction in this case. The purpose of the Disclosure Act is not to create rights but to protect rights, once granted, by requiring their disclosure. *See Sylvania Electric Products, Inc.* v. *N.L.R.B.*, 358 F.2d 591, 592 (1st Cir. 1966). The general supervision of the administration of such pension plans remains in the state courts, absent diversity jurdisdiction. See *Lieberman* v. *Cook,* 343 F. Supp. 558, 562 (W.D. Pa. 1972).

Plaintiff's other arguments for federal question jurisdiction are similarly unconvincing. Merrill Lynch's "admission" that state antitrust laws should not apply because of the Plan's interstate nature was not accepted by the United States Supreme Court in *Merrill Lynch* v. *Ware,* 414 U.S. 117, 140 (1973). The Supreme Court also stated ". . . Merrill Lynch has not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy." *Id.* at 136. The same may certainly be said concerning the federal policy—if there be such—with respect to profit-sharing plans. In *Bradford* v. *New York Times,* 501 F.2d 51 (2d Cir. 1974), a case much cited by plaintiff, the Court of Appeals for this circuit applied New York State law to evaluate the covenant not to compete in a similar retirement plan. In response to a claim that such a covenant constituted a *per se* violation of the Sherman Act, the court commented that:

> "Although employee restraints have been known to the common law since the 15th century . . . a state court or, in a diversity case, a federal court applying state law, provides the usual forum for protecting the employee and whatever interest the public may have." 501 F.2d at 60.[4]

[3] Parenthetically, it may be noted that profit-sharing plans might equally well be argued to be creations of state law by virtue of such statutory provisions as N.Y. Bus. Corp. Law § 202(a) (13), which gives New York corporations the power to establish and administer such profit-sharing plans.



It is also well-settled that in providing for declaratory judgment relief pursuant to 28 U.S.C. § 2201, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950).

Neither the specific statutes cited by plaintiff nor general federal public policy considerations thus support the extension of federal question jurisdiction to cover profit-sharing plans in general or this Plan in particular.

*Diversity Jurisdiction*

Mr. Carl Antenucci, one of the defendants in this action, has stated in an affidavit attached to defendants' moving papers that he is a citizen of New Jersey. As plaintiff alleges that he also is a New Jersey citizen, there is not the complete diversity necessary to give this court jurisdiction.[5] See *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch), 267 (1806).

Since this court also lacks federal question jurisdiction, as noted *supra,* plaintiff's common law claims cannot be retained in this court on the basis of pendent jurisdiction, see *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 727 (1966), and *Kavit* v. *A. L. Stamm & Co.,* 491 F.2d 1176, 1179-80 (2d Cir. 1974).

As this court has no jurisdiction over the subject matter of this action, it must be dismissed in its entirety. It is so ordered.

Dated: January 14, 1975.

H. R. TYLER, JR.,
U.S.D.J.

[4] The court also noted that: "It is very dubious that Bradford's employment with Scripps-Howard had more than a deminimis effect, if any, upon interstate commerce." *Id.* at 59, n.5.

[5] Plaintiff's cross-motion for leave to drop Antennucci as a party defendant was withdrawn without prejudice at oral argument on November 8, 1974.

**Appendix B, Opinion United States Court of Appeals for the Second Circuit.**

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 987—September Term, 1974.

(Argued June 18, 1975 Decided July 29, 1975.)

Docket No. 75-7100

William H. Nolan, on behalf of himself and all others similarly situated,

*Appellant,*

v.

Richard B. Meyer, Carl Antenucci, Steve Narker, Thomas White, Leslie C. Kissick and Michael N. Sottile, as Administrators and Trustees of the Profit Sharing Plan for the Employees of Merrill Lynch, Pierce, Fenner & Smith, Inc.,

*Appellees.*

Before:

Gibbons,* Gurfein and Meskill,

*Circuit Judges.*

Appeal from an order entered by the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge,* dismissing plaintiff's complaint in an action alleging, *inter alia,* that the forfeiture of benefits clause contained in his ex-employer's profit-sharing plan was violative of federal common law. The district court

* United States Circuit Judge for the Third Circuit, sitting by designation.





dismissed the complaint for lack of jurisdiction over the subject matter.

Held, order affirmed. The federal regulatory statutes relied on by plaintiff do not manifest a sufficient federal interest in the general subject matter of profit-sharing plans as to create a body of federal common law which would proscribe the inclusion of a forfeiture of benefits clause therein.

Milton S. Zeiberg, *Attorney for Appellant.*

Brown, Wood, Fuller, Caldwell & Ivey, *Attorneys for Appellees,* Thomas J. Mullaney and Roger J. Hawke, Of Counsel.

Gibbons, *Circuit Judge:*

Plaintiff Nolan appeals from an order which granted a Rule 12(b)(1) motion, Fed. R. Civ. P., dismissing his class action complaint against the defendants as administrators and trustees of the Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Profit Sharing Plan for lack of subject matter jurisdiction. We affirm.

Nolan, a former employee of Merrill Lynch, challenges the provision in the noncontributory profit-sharing plan which provides for forfeiture of benefits by a participant who engages in competitive employment.[1] The complaint

1 The forfeiture of benefits provision, article 11.1 of the plan, provides:

"A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960." (App. at 39a).

In 1968, Nolan voluntarily left Merrill Lynch where he had been

alleges jurisdiction founded on diversity of citizenship and requisite amount in controversy. In support of their motion to dismiss, the defendants filed the affidavit of one of the plan's administrators which established that both he and the plaintiff were citizens of New Jersey. Nolan concedes that there is no diversity jurisdiction. The complaint also asserts as a basis for federal question jurisdiction, the claim that the forfeiture provision violates Section 1 of the Sherman Act, 15 U.S.C. § 1. Nolan concedes that the Sherman Act cause of action which he pleaded is barred by the statute of limitations. 15 U.S.C. § 15(b). The complaint alleges a pendent state common law cause of action which may not be time barred, but Nolan concedes that there must be a not insubstantial federal question claim before the district court may proceed with the adjudication of the pendent state claim. He now relies solely upon the assertion of a federal common law cause of action to recover the forfeited benefits which, he says, is implied from the existence of the two federal statutes dealing with employee benefit plans.

If the complaint sets forth such a federal common law cause of action, then there is jurisdiction under 28 U.S.C. § 1331(a). *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *Ivy Broadcasting Co., Inc.* v. *American Tel. & Tel. Co.,* 391 F.2d 486 (2d Cir. 1968). And where the complaint alleges the existence of such a federal common law cause of action, that allegation may suffice to avoid the granting of a Rule 12(b)(1) motion and may require that the court consider the claim on the merits pursuant to Rule 12(b)(6). *Bell* v. *Hood,* 327 U.S. 678 (1946). Even a somewhat marginal federal question claim may suffice to

employed since 1957 as an account executive, and took a position with another New York brokerage firm. The defendants declared his benefits accumulated after 1960 forfeited pursuant to article 11.1.





support pendent jurisdiction. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). But there must be some minimum degree of substantiality or non-frivolity to the federal claim. If the claim is obviously without merit or wholly frivolous the federal court may dismiss for want of jurisdiction. *Hagans* v. *Lavine, supra,* at 537-38. A strong indicator of the insubstantiality of the federal claim is the resolution of the claimed issue in a prior Supreme Court decision. *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103 (1933). With these rules in mind, then, we look to the four corners of plaintiff's complaint to determine whether it alleges a federal claim sufficient to confer jurisdiction. *Phillips Petroleum* v. *Texaco, Inc.,* 415 U.S. 125, 127-28 (1974).

The two statutes on which Nolan relies are Subchapter D of the Internal Revenue Code of 1954, 26 U.S.C. § 401 *et seq.,* and the Welfare and Pension Disclosure Act of 1958, 29 U.S.C. § 301 *et seq.*[2] His argument is that Congress, by these two enactments, expressed such an overriding concern with the subject matter of profit sharing plans, that it would be proper to imply from them a federal common law cause of action for the recovery of benefits lost under a clause permitting forfeiture for competitive employment. Nolan concedes that neither statute confers such a remedy, and that neither statute proscribes the inclusion of a forfeiture clause in a pension plan contract. Indeed, he concedes that the Merrill Lynch plan was a qualified plan under Subchapter D of the Internal Revenue Code.

Thus, we are not dealing with a situation in which either the federal constitution or a federal statute defines a substantive right, for the enforcement of which a federal

2 Both statutes were amended by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* But that statute is prospective in operation. § 514, 29 U.S.C. § 1144(b)(1).

remedy may fairly be implied. *E.g., Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971); *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *International Ass'n of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963); *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944); *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co., supra; United States* v. *Perma Paving Co.,* 332 F.2d 754 (2d Cir. 1964); *Fielding* v. *Allen,* 181 F.2d 163 (2d Cir.), *cert. denied,* 340 U.S. 817 (1950); *Reitmeister* v. *Reitmeister,* 162 F.2d 691 (2d Cir. 1947).[3] Nor are we dealing with a jurisdictional grant from which may fairly be implied a Congressional intention that the federal courts fashion a federal substantive common law, as in *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957). Rather we are asked to hold that the two enactments relied upon manifest a sufficient federal interest in the general subject matter of employee profit-sharing plans that (1) we should conclude that a uniform federal law should apply, (2) we should hold that the forfeiture clause is illegal under that law, and (3) we should imply a federal cause of action for the recovery of benefits payable under the plan.

Proceeding no further than the first proposed step, we encounter a formidable obstacle. In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117 (1973), the very forfeiture provision with which we are concerned was before the Supreme Court on certiorari from a California state court. The state court had held that the clause was void under § 16600 of the California Business and Professions Code which renders void "every contract by which anyone is restrained from a lawful profession, trade, or business. . . ." It rejected the Merrill Lynch contention that the forfeiture provision was valid both under the New York law to which the contract referred[4] and under the laws of the United States. The Supreme Court affirmed. The precise issue was whether California could apply not only § 16600 of the California Business and Professions Code, but also §§ 220 and 229 of the California Labor Code which make unenforceable an agreement to arbitrate a dispute over wages. The Court declined to federalize the applicable law. Although neither federal statute on which Nolan relies is referred to, the holding is that a claim for benefits under the Merrill Lynch profit-sharing plan is a claim for wages, and that such a claim is governed by state law. Merrill Lynch argued in *Ware* that the pervasive federal regulation of the securities industry justified a uniform federal law of arbitrability of disputes between a broker and its employees, and could point to federal law which arguably gave it a right to arbitrate.[5] The Court declined the invitation to hold that this was a reason for federalizing the wage contract. Neither the Internal Revenue Code nor the Welfare and Pension Disclosure Act contains a substantive provision even arguably suggesting that the forfeiture clause in issue was illegal while Nolan

3 Even in cases where there is a federal constitutional or statutory substantive right the Court has sometimes declined to imply therefrom a remedy. *E.g., Crane* v. *Cedar Rapids & Iowa City Ry. Co.,* 395 U.S. 164 (1969); *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963).

4 An arbitration clause in the plan which was mandated by rules promulgated under the Securities and Exchange Act would have applied New York law. That state has held that the forfeiture clause in the Merrill Lynch plan does not constitute an unreasonable restraint of trade. *Smith* v. *Meyer,* 78 Misc. 2d 711, 357 N.Y.S. 2d 586 (Sup. Ct. N.Y. Co. 1973), *aff'd,* 44 A.D.2d 778, 355 N.Y.S.2d 314 (1st Dept. 1974), *leave to appeal denied,* 34 N.Y.2d 517 (1974).

5 Merrill Lynch relied on 15 U.S.C. §§ 78f(d) and 78s(b), and the rules of the New York Stock Exchange adopted pursuant thereto.

was a Merrill Lynch employee. If the federal statutes and regulations relied on in the *Ware* case were an insufficient basis for federalizing the law of profit-sharing plans, a fortiori, those relied on by Nolan will not fill the bill. *Cf. Cuff* v. *Gleason*, No. 74-2504 (2d Cir., Apr. 15, 1975); *Haley* v. *Palatnick*, No. 74-1948 (2d Cir., Jan. 24, 1975); *Lieberman* v. *Cook*, 343 F.Supp. 558 (W.D. Pa. 1972); *Barlow* v. *Marriott Corp.*, 328 F.Supp. 624 (D. Md. 1971).

Proceeding to the second step, a holding that the forfeiture clause is illegal, the chief problem is that the alleged illegality has nothing to do with either statute. Nolan's contention is that the clause is an unlawful post-employment restraint of trade of employees engaged in the sale of securities. It is hardly necessary to imply from the Internal Revenue Code or the Welfare and Pension Disclosure Act a suggestion of illegality in restraint of trade when Congress, decades before either statute was enacted, dealt comprehensively with restraints of trade in the Sherman Anti-Trust Act. If there is any federal cause of action it is the specific statutory one granted by the private remedy provisions of the anti-trust laws. That cause of action, Nolan concedes, is time barred.

Finally, even if we could traverse steps one and two, it is not at all clear that a federal basis for holding the forfeiture clause illegal would mean that a claim for benefits under the pension plan contract would be a claim arising under the laws of the United States for purposes of § 1331 jurisdiction. The source of the contract right here is the state law of contracts. Thus, were we to federalize the law of post-employment restraints, the federal statutes relied on by appellant would be involved only to the extent of removing the defense that the profit-sharing benefits had





been forfeited. *See Phillips Petroleum Co.* v. *Texaco, supra. Compare Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

The last point, however, is not essential to our conclusion that the federal cause of action upon which Nolan relies for § 1331 jurisdiction is so insubstantial that the complaint was properly dismissed. We hold that neither the Internal Revenue Code nor the Welfare and Pension Disclosure Act defines a substantive right for the enforcement of which a remedy for the collection of profit-sharing benefits may be implied, that the subject matter of such contract benefits is a matter of state law, and to the extent that the federal antitrust law might prohibit the inclusion of a forfeiture clause in a profit-sharing plan directed against competitive employment, any such cause of action is time barred by 15 U.S.C. § 15(b). Thus the district court properly dismissed the complaint for lack of jurisdiction.

Realizing that under *Bell* v. *Hood, supra*, the implied federal common law claim might be sufficient to provide a basis for federal jurisdiction even though unmeritorious, and hence under *Hagans* v. *Lavine, supra*, a predicate for pendent jurisdiction, we also recognize that pendent jurisdiction is a matter of discretion, not of plaintiff's right. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Technically, since the district court dismissed under Rule 12(b)(1), rather than under Rule 12(b)(6), it had no occasion to exercise such discretion. We can assume, however, from the tenor of the court's opinion, that it would have determined not to retain the state law claim for trial after dismissing the federal law claim on the merits. Moreover we would be inclined to hold that the retention of jurisdiction for trial of a pendent state law claim on the basis of

*Appendix B, Opinion United States Court of Appeals for the Second Circuit.*

a federal question claim already disposed of by a Rule 12(b)(6) motion, would be an abuse of discretion absent unusual circumstances, not present here, suggesting some prejudice arising from relegating the case for trial in the state court. Thus, although it has sometimes been suggested that the rejection of an insubstantial federal question claim is a decision on the merits rather than a jurisdictional decision, in this instance the outcome would be the same. *See T.B. Harms Co.* v. *Eliscu, supra,* at 828.

The judgment of the district court will be affirmed.





## Appendix C, Pension Reform Act of 1974, 29 USC § 1001 (1974).

### SUBCHAPTER I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

#### Subtitle A—General Provisions

**§ 1001. Congressional findings and declaration of policy**

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Pub.L. 93–406, Title I, § 2, Sept. 2, 1974, 88 Stat. 832.

**References in Text.** This Act, referred to in subsecs. (b) and (c), means the Employee Retirement Income Security Act of 1974, Pub.L. 93–406, Sept. 2, 1974, 88 Stat. 829, which enacted this chapter. For additional classification of the Act to the Code, see Short Title note under this section.

**Short Title.** Section 1 of Pub.L. 93-406 provided that: "This Act [enacting this chapter, sections 408 to 415, 4971 to 4975, 6057 to 6059, 6692, and 6693 of Title 26, Internal Revenue Code, section 1037 of Title 31, Money and Finance, and section 1320b–1 of Title 42, The Public Health and Welfare, amending section 441 of this title, sections 5108 and 5109 of Title 5, Government Organization and Employees, sections 664, 1027, and 1954 of Title 18, Crimes and Criminal Procedure, sections

## Appendix D, Employee Benefit Security Act of 1973.

93D CONGRESS
*1st Session*

REPORT
No. 93-533

HOUSE OF REPRESENTATIVES

EMPLOYEE BENEFIT SECURITY ACT OF 1973

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OCTOBER 2, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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MR. PERKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL, AND INDIVIDUAL VIEWS

[To accompany H.R. 2]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2) to revise the Welfare and Pension Plans Disclosure Act, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass. The amendment substitutes all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

### I. SYNOPSIS

The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the



private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analysed on the basis of their projected costs in relation to the anticipated benefit to the employee participant. In broad outline, the bill is designed to:

(1) establish equitable standards of plan administration;

(2) mandate minimum standards of plan design with respect to the vesting of plan benefits;

(3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;

(4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and

(5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Provision is made for the imposition of criminal penalties on those willfully violating their duties under the Act. The Labor Department is given primary authority to administer the provisions of the Act, but the Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries.

## II. Background

The private pension system is a relatively modern economic institution tracing its role as an important social and economic factor only from the mid 1940's. A variety of converging financial and social trends in our society have created a favorable environment for the growth and expansion of private deferred compensation schemes and retirement programs in general. As our economy has matured, an ever increasing number of employers have recognized their responsibility for the physical and economic welfare of their employees, even for the years beyond retirement. Its development parallels and is a response to the transition of the American life style from its rural agrarian antecedents into its present urbanized, wage earner society. The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.

The growth of the private pension movement in the United States proceeded slowly until the years preceding World War II. As the full implications of the economic changes sweeping the nation were felt, American beliefs and attitudes regarding retirement security changed. The passage of the Railroad Retirement Act and the Social Security Act marked the turning point in American thinking, and dissatisfaction with those early govermental programs contributed to an accelerated interest in private retirement plans. The wage freezes imposed during World War II and the Korean conflict focused increased attention on the deferred component of compensation as a means of avoiding the freeze restrictions.

In 1947 a series of administrative proceedings and court decisions under the National Labor Relations Act of 1935



held that pensions were a form of remuneration for the purposes of that Act, and they accordingly became mandatory subjects of collective bargaining. (Inland Steel Company v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)). In the same time period a Presidential fact finding commission in presenting its report on the steel industry labor dispute in 1949 stated that:

> We think all industry in the absence of adequate Government programs, owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement—in the same way as it now does for plant and machinery.

In 1940, an estimated four million employees were covered by private pension plans; in 1950, the figure had increased to almost 10 million and in 1960 over 21 million were covered. Currently, over 30 million employees or almost one half of the private non-farm work force are covered by these plans. This phenomenal expansion of coverage has been matched by an even more startling accumulation of assets to back the benefit structure. Today, in excess of $150 billion in assets are held in reserve to pay benefits credited to private plan participants.

This rapid growth has constituted the basis for legislative efforts at both the federal and state levels to assure equitable and fair administration of all pension plans.

Various aspects of pension plans have been affected to some degree by most of the major labor legislation of the twentieth century, including the National Labor Relations Act (1935), the Labor Management Relations Act (1947), and the Labor Management Reporting and Disclosure Act (1959). However, not until 1958, with the enactment of the Welfare and Pension Plans Disclosure Act, was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds. Based upon disclosure of malfeasance and improper activities by

pension administrators, trustees, or fiduciaries, the Act was amended in 1962 to designate certain acts of conduct as federal crimes when they occurred in connection with welfare and pension plans. The amendments also conferred investigatory and various regulatory powers upon the Secretary over pension and welfare funds. In the decade since the amendments were enacted, experience has shown that, despite intermittent enforcement of the reporting requirements and the criminal provisions, the protection accomplished by statute has not been sufficient to accomplish Congressional intent.

### The Existing Law

The growth and development of the private pension system in the past two decades has been substantial. Yet, regulation of the private system's scope and operation has been minimal and its effectiveness a matter of debate. The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private accumulation of funds which have escaped the imprimatur of effective federal regulation.

At the federal level, there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities. These are the Welfare and Pension Plans Disclosure Act (29 U.S.C. Sec. 301 et seq.), the Labor Management Relations Act (29 U.S.C. Sec. 141, et seq.) and the Internal Revenue Code I.R.C. of 1954, Secs. 401-404, 501-503.

A complete description of the federal regulation affecting the administration of private plans can be found in Interim Report of The Private Welfare and Pension Plan Study, 1971, Senate Report No. 92-634 of the 92d Congress 2d Session.



After a comprehensive investigation of abuses in the administration and investment of private fund assets, Congress adopted the Welfare and Pension Plan Disclosure Act in 1958. The policy underlying enactment of this Act was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. The essential requirement of the Act was that the plan administrator compile file with the Secretary of Labor, and send to participants and their beneficiaries upon written request, a description and annual report of the plan. It was expected that the knowledge thus disseminated would enable participants to police their plans. The Act was amended in 1962 to make theft, embezzlement, bribery, and kickbacks federal crimes if they occur in connection with welfare and pension plans. The 1962 amendments also conferred limited investigatory and regulatory powers upon the Secretary of Labor, and required bonding of plan officials.

Experience in the decade since the passage of the above amendments has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found in its reliance upon the initiative of the individual employee to police the management of his plan.

The Labor Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.

Tax deduction benefits accruing to employers are prescribed by the Internal Revenue Code under which the employer is granted a deduction within certain limits for contributions made to a qualified plan, and the investment earnings on such plans are made tax-exempt. To attain "qualified status" under the Code, the plan must be (1) for the exclusive benefit of the participants; (2) for the purpose of distributing the corpus or income to the participants; (3) established in such a manner to make it impossible for the employer to use or divert funds before satisfying the plan's liabilities; and (4) not discriminate in favor of officers, stockholders, or highly-compensated or supervisory employees.

The Internal Revenue Code provides only limited safeguards for the security of anticipated benefit rights in private plans since its primary functions are designed to produce revenue and to prevent evasion of tax obligations. The essence of enforcement under the Code lies in the power of the Internal Revenue Service to grant or disallow qualified status to a pension plan, thus determining the availability of statutory tax advantages. The Internal Revenue Service jurisdiction and enforcement capabilities are solely to allow various tax advantages to accrue to employers who establish and maintain pension plans which can qualify for such tax benefit privileges.

In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. A few states, including New York, Washington, Wisconsin, Massachusetts, and California have codified existing trust principles and enacted legislation which requires in many instances a degree of disclosure similar to that required by federal statute.

The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee. In almost every instance, participants lose their



benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording. Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.

The proposed bill would, therefore, establish minimum standards of vesting, funding, and fiduciary and a system of compulsory benefit insurance to protect the security of pension rights.

As suggested by the President's Cabinet Committee Report of 1965; "As a matter of equity and fair treatment an employee covered by a pension plan is entitled, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment." Concern for loss of benefits by workers after long years of labor through circumstances beyond their control was similarly expressed by President Richard M. Nixon on December 8, 1971, when, in a message to the Congress he said, "When a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested . . . even one worker whose retirement security is destroyed by the termination of a plan is one too many."